FILE COPY

MAY 5 19

JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 101

CITY OF CHICAGO, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal From the United States District Court for the Northern District of Illinois

JURISDICTIONAL STATEMENT

(See counsel on page 2 of cover)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

Of Counsel:

MATHIAS M. MATTERN
BERNARD RANE
MARK GOLDSTEIN
511 City Hall Bldg.
Chicago, Ill.

KEITH E. ROBERTS
120 S. LaSalle St.
Chicago, Ill. 60603

ANTHONY HASWELL
333 N. Michigan Ave.
Chicago, Ill. 60601

WILLIAM E. NELSON
Dyer Building
Hoopeston, Ill. 60942

WENDELL W. WRIGHT
MARION E. WRIGHT
106 N. Vermilion St.
Danville, Ill. 61832

GEORGE B. TOPAUTE
17 Harding Ave.
Terre Haute, Ind. 47801

ROBERT P. DOOLITTLE, JR.
801 Busseron St.
Vincennes, Ind. 47591

HENRY C. NEEL
Farm Credit Bldg.
Henderson, Ky.

EUGENE W. WARD
J. KENNETH ATKINS
C-1, 120 Cordell Hull Bldg.
Nashville, Tenn. 37219

WILLIAM F. BLACK
CARL L. EVANS
State Office Bldg.
Montgomery, Ala. 36102

CARL E. VAN DORN
807 State Office Bldg.
Indianapolis, Ind. 46204

BENNETT E. SMITH
State Office Bldg., Rm. 1105
Jackson, Miss. 39201

CHESTER L. RIGSBY
State Office Bldg.
Frankfort, Ky. 40601

May 1969

RAYMOND F. SIMON
511 City Hall Bldg.
Chicago, Ill. 60602

CHARLES E. GRIFFITH III
ROBERT E. KENDRICK
204 Metropolitan Courthouse Bldg.
Nashville, Tenn. 37201

ARTHUR K. BOLTON
J. ROBERT COLEMAN
132 State Judicial Bldg.
Atlanta, Ga. 30334

GORDON P. MACDOUGALL
705 Ring Bldg.
Washington, D. C. 20036

Attorneys for Appellants

INDEX

	Page
Opinions Below	2
Jurisdiction	3
Statutes Involved	3
Question Presented	4
Statement	4
Commission Proceedings	4
Court Proceedings	6
The Question Is Substantial	8
Argument	10
Conclusion	15
Appendix A—49 U.S.C. § 13a(1) and 28 U.S.C. § 1336 (a)	1a
Appendix B—Opinion and Order of the Court Below	7a
Appendix C—Opinion and Order of Interstate Commerce Commission	8a
Appendix D—Order on Reconsideration of Interstate Commerce Commission	32a
Appendix E—Corrected Order on Reconsideration of Interstate Commerce Commission	34a

CITATIONS

CASES:

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)	12
American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951)	14
Arrow Co. v. Cincinnati, N.O. & T.P.R., 379 U.S. 642 (1965)	14
Arrow Transp. Co. v. Southern R. Co., 372 U.S. 658 (1963)	13
Brown Shoe Co. v. United States, 370 U.S. 294 (1962)	14
Chicago & E.I.R. Co. Discontinuance-Chicago & Evansville, 331 I.C.C. 447 (1968)	2
Cincinati, New Orleans & Texas Pac. R. Co. v. United States, 229 F. Supp. 572 (S.D. Ohio 1964), modified	

Page

sub nom. Arrow Co. v. Cincinnati, N.O. & T.P.R., 379 U.S. 642 (1965) 14
City of Chicago v. United States, 294 F. Supp. 1103 (N.D. Ill. 1969) .....passim
City of Chicago v. United States (No. 68 C 2184, N.D. Ill. E.D., pending) 9
City of Sheridan v. United States (No. 5316-Civil, D. Wyo., pending) 9
City of Williamsport v. United States, 273 F. Supp. 899 (M.D. Pa. 1967), 282 F. Supp. 46 (M.D. Pa. 1968), aff'd per curiam 392 U.S. 642 (1968) ..3, 8, 14
Louisville & N.R. Co. Discontinuance of Trains, 333 I.C.C. 720 (1968) 6
Penn-Central Merger Cases, 389 U.S. 486 (1968) 10
People of State of California v. United States, 258 F. Supp. 950 (N.D. Calif. 1966) 8
Public Service Board of State of Vermont v. United States, 87 S.Ct. 3 (1966) 9
Rochester Telephone Corp. v. United States, 307 U.S. 125 (1939) 12
Sludden v. United States, 211 F. Supp. 150 (M.D. Pa. 1962) 11
State of Minnesota v. United States, 238 F. Supp. 107 (D. Minn. 1965) 8, 10, 11, 14
State of New Hampshire v. United States, 251 F. Supp. 421 (D. N.H. 1965) 8, 14
State of New York v. United States, F. Supp. (N.D. N.Y. 1969) 9
State of New Jersey v. United States, 168 F. Supp. 324 (D. N.J. 1958), aff'd per curiam 359 U.S. 27 (1959) 11, 13
State of Vermont v. Boston & Maine Corp., 269 F. Supp. 80 (D. Vt. 1967) 8
Tennessee Public Service Commission v. United States, 294 F. Supp. 1106 (N.D. Ill. 1969) 2
United States v. Dixie Express, 389 U.S. 409 (1967) 15

STATUTES:

5 U.S.C. § 551 11
5 U.S.C. § 701 11
28 U.S.C. § 1336(a) 3, 11
28 U.S.C. § 1398(a) 10
49 U.S.C. § 13a(1) 2, 3, 4, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

CITY OF CHICAGO, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal From the United States District Court for the Northern District of Illinois

---

JURISDICTIONAL STATEMENT

City of Chicago, The Metropolitan Government of Nashville and Davidson County, Tennessee, Village of Milford, City of Watseka, City of Hoopeston, City of Danville, City of Terre Haute, City of Vincennes, City of Henderson, Maurice F. Radrizzi, National Association of Railroad Passengers, Indiana Public Service Commission, Georgia Public Service Commission, Tennessee Public Service Commission, Alabama Pub-

lic Service Commission, Mississippi Public Service Commission and Kentucky Railroad Commission, appeal from the order of the United States District Court for the Northern District of Illinois-Eastern Division, entered January 8, 1969, dismissing their complaint seeking to set aside and to annul findings, decisions and orders of the Interstate Commerce Commission (Commission), relating to the discontinuance by Chicago and Eastern Illinois Railroad Company (C&EI) of its segment of the "Georgian" passenger train between Chicago, Ill. and Evansville, Ind. (287 miles).

The court below dismissed plaintiffs' complaint on the sole ground that an action may not be brought to review any decision or order of the Commission allowing a passenger train discontinuance pursuant to section 13a(1) of the Interstate Commerce Act, 49 U.S.C. § 13a(1).

OPINIONS BELOW

The opinion of the three-judge court for the Northern District of Illinois was entered January 8, 1969, and is reported at *City of Chicago* v. *United States*, 294 F. Supp. 1103. The opinion and order are set forth herein as Appendix B. The case below was heard jointly with *Tennessee Public Service Commission* v. *United States*, 294 F. Supp. 1106.

The report and order of the Interstate Commerce Commission, Division 3, dated January 25 and served January 31, 1968, were entered in its Finance Docket No. 24725, *Chicago & E.I.R. Co. Discontinuance-Chicago & Evansville*, and are reported at 331 I.C.C. 447. The report and order are set forth herein as Appendix C.

The order of the Interstate Commerce Commission, Division 3, upon reconsideration was entered May 8 and served May 15, 1968 at 9:30 A.M., and is set forth herein as Appendix D. The corrected order upon reconsideration, entered May 8 and served May 15, 1968 at 3 P.M., is set forth herein as Appendix E.

JURISDICTION

This suit was brought May 27, 1968 in the three-judge court pursuant to 28 U.S.C. § 1336(a), 1398(a), 2284, 2321-25, 5 U.S.C. § 702, and 49 U.S.C. § 17(9), to annul and to set aside findings, decisions and orders of the Interstate Commerce Commission entered under 49 U.S.C. § 13a(1), dated January 25 and May 8, 1968.

The order and opinion of the district court dismissing the complaint were entered January 8, 1969.

Notice of appeal was filed in the district court for the Northern District of Illinois-Eastern Division on March 6, 1969.

Jurisdiction of the Supreme Court to review this order by direct appeal is conferred by 28 U.S.C. § 1253 and § 2101(b). Jurisdiction specifically for interstate passenger trains under 49 U.S.C. § 13a(1) is sustained by *City of Williamsport* v. *United States*, 273 F. Supp. 899 (M.D. Pa. 1967), 282 F. Supp. 46 (M.D. Pa. 1968), aff'd *per curiam* 392 U.S. 642 (1968).

STATUTES INVOLVED

The statutes involved in this case are section 13a(1) of the Interstate Commerce Act, 49 U.S.C. § 13a(1), enacted August 12, 1958, 72 Stat. 571, and 28 U.S.C. § 1336(a), and are set forth in Appendix A herein.

QUESTION PRESENTED

Do the U.S. District Courts possess jurisdiction to review decisions and orders of the Interstate Commerce Commission, entered under 49 U.S.C. § 13a(1) after hearing and investigation, where the Commission has found that an interstate passenger train, or a part thereof, is not required by the public convenience and necessity and that continued operation thereof would unduly burden interstate or foreign commerce?

STATEMENT

This appeal involves the "Georgian" passenger train. The companion appeal involves the "Hummingbird" passenger train. The two trains interconnect at Nashville, Tenn., and are together advertised and commonly known as the "Georgian-Hummingbird" train service.

The "Georgian" runs between Chicago, Ill. and Atlanta, Ga. It is operated by C&EI between Chicago, Ill. and Evansville, Ind., and by Louisville & Nashville Railroad Company (L&N) between Evansville, Ind. and Atlanta, Ga. The "Hummingbird" operates between Cincinnati, Ohio and New Orleans, La. Passengers are interchanged between the "Georgian" and the "Hummingbird" at Nashville, Tenn.

Commission Proceedings

C&EI filed a notice with the Commission on August 31, 1967 that it would, effective October 1, 1967, discontinue its trains Nos. 93 and 54 between Chicago, Ill. and Evansville, Ind.[1] The Commission on Sep-

[1] L&N's segment of the trains is likewise numbered Nos. 93 and 54. (App. C, p. 12a)

tember 18, 1967 entered upon an investigation into the proposed discontinuance, and ordered continued operation pending hearing and decision in its investigation.

After hearings in Illinois and Indiana, Division 3 of the Commission on January 25, 1968 entered its report, served January 31, finding that the operation by C&EI of its passenger trains Nos. 93 and 54 between Chicago, Ill. and Evansville, Ind. is not required by the public convenience and necessity, and that continued operation thereof would unduly burden interstate and foreign commerce. (App. C, p. 28a). The C&EI segment of the "Georgian" was discontinued on February 1, 1968. The "Georgian" today originates at Evansville, Ind. and terminates at Atlanta, Ga.

Certain protestants to the agency proceeding petitioned for reconsideration, contending that the carrier had not effectively invoked the jurisdiction of the Interstate Commerce Commission. The Commission, Division 3, upon reconsideration initially ruled in protestants' favor by dismissing the entire proceeding for failure of C&EI to effectively invoke the Commission's jurisdiction. (App. D, pp. 32a-33a). However, the order on reconsideration, issued May 15, 1968 at 9:30 A.M., was replaced by a corrected order served 3:00 P.M. the same day which denied reconsideration in all respects. (App. E, pp. 34a-35a).

During the pendency of the reconsideration proceedings, L&N on April 3, 1968 filed, served and posted notice that it would, effective May 7, 1968, discontinue the "Hummingbird" over its entire run between Cincinnati, Ohio and New Orleans, La. L&N informed the Commission, simultaneously with the filing of its notice proposing to terminate the "Hummingbird", that the

discontinuance of C&EI's segment of the "Georgian" resulted in the immediate loss of the bulk of the passenger business handled on the connecting "Hummingbird".

Court Proceedings

Plaintiffs [2] on May 27, 1968 commenced their action to review the partial discontinuance of the "Georgian" passenger train. The defendant railroad moved to dismiss the action for lack of subject-matter jurisdiction in the court. Plaintiffs moved for summary judgment in their favor for lack of jurisdiction in the Commission, basically for the reasons outlined by the Commission in its first order on reconsideration served May 15, 1968.

While these motions were pending, the Commission, Division 3, entered its decision in the "Hummingbird" case, dated September 3 and served September 6, 1968, permitting these trains to be discontinued. *Louisville & N.R. Co. Discontinuance of Trains*, 333 I.C.C. 720. Upon the service date certain of the appellants herein,[3]

---

[2] The original plaintiffs were City of Chicago, Metropolitan Government of Nashville and Davidson County, Tennessee, Village of Milford, City of Watseka, City of Hoopeston, City of Danville, City of Terre Haute, City of Vincennes, Maurice F. Radrizzi (Brotherhood of Railroad Trainmen). Intervening plaintiffs were Georgia Public Service Commission, Tennessee Public Service Commission, National Association of Railroad Passengers, Alabama Public Service Commission, City of Evansville, Indiana Public Service Commission, City of Henderson, Kentucky Railroad Commission, and Mississippi Public Service Commission.

[3] City of Chicago, Tennessee Public Service Commission, Metropolitan Government of Nashville and Davidson County, Tennessee, and Alabama Public Service Commission.

and other plaintiffs,[4] commenced an action that day in the court below to review the decision permitting discontinuance of the "Hummingbird" trains, and requested issuance of a temporary restraining order preventing discontinuance until their case could be heard. Other plaintiffs intervened.[5] Defendants United States and Commission did not oppose entry of the restraining order, and it was granted. The Commission, by Division 3, acting as an Appellate Division, on October 31, 1968 denied petitions for reconsideration of the "Hummingbird" decision.

The court below dismissed both actions on January 8, 1969. In both cases the court held that it was without power under the Judicial Code to review decisions and orders of the Commission, rendered after hearing and investigation, allowing a passenger train discontinuance, because "it seems apparent that Congress intended to deny judicial review in the instant case". (App. B, p. 7a). However, the court below acknowledged the right of judicial review at the suit of the railroads if the Commission's decision is adverse to the carriers. (App. B, p. 6a).

The "Hummingbird" was discontinued in the morning of January 9, 1969, in mid-run at Birmingham, Ala.[6] Application for Stay filed later that day with Mr. Justice Marshall was denied on January 13, 1969.

---

[4] State of Louisiana, Public Utilities Commission of Ohio, Railway Labor Executives' Association and United Transport Service Employees (AFL-CIO).

[5] Kentucky Railroad Commission and Mississippi Public Service Commission.

[6] Washington Post, "Noted Train Quits, Bus Takes Over," January 11, 1969.

THE QUESTION IS SUBSTANTIAL

There is a clear split between district courts as to whether the public has the right of judicial review in train-off cases. All courts agree that the railroads do have the right of judicial review if the agency decision is adverse to the carrier. This appeal has been taken to finally establish that the public has the same right as a railroad to seek judicial review of final agency decisions affecting railroad passenger service.

Two early district court decisions had ruled against the right of a State to seek judicial review. *State of Minnesota* v. *United States,* 238 F. Supp. 107 (D. Minn. 1965); *State of New Hampshire* v. *United States,* 251 F. Supp. 421 (D. N.H. 1965). Two subsequent opinions by three-judge courts in the District of Vermont and the Middle District of Pennsylvania rejected the reasoning of *State of Minnesota* and *State of New Hampshire,* and held that judicial review does exist where the Commission enters upon an investigation under section 13a(1), compiles a record, and issues a report with its findings. *State of Vermont* v. *Boston & Maine Corp.,* 269 F. Supp. 80 (D. Vt. 1967); *City of Williamsport* v. *United States,* 273 F. Supp. 899 (M.D. Pa. 1967), 282 F. Supp. 46 (M.D. Pa. 1968), aff'd *per curiam* 392 U.S. 642 (1968). A third court assumed jurisdiction without discussion. *People of State of California* v. *United States,* 258 F. Supp. 950 (N.D. Calif. 1966).

The opinion of the court below, denying the right to judicial review, is the first reported decision on the point since this Court's decision last term in *City of Williamsport, supra.* However, a different three-judge panel, in the very court below, with knowledge of the

decision of its brethren now under appeal, on February 14, 1969 denied motions by railroads to dismiss for lack of jurisdiction, thus creating a conflict within the same judicial district.[7] A three-judge district court for the Northern District of New York, in its opinion rendered March 4, 1969, upheld the right of the State of New York to seek judicial review. *State of New York* v. *United States,* F. Supp. (N.D.N.Y. 1969).[8] A three-judge court for the District of Wyoming on February 27, 1969 continued a temporary restraining order barring a train discontinuance, and has set the agency decision for full judicial review.[9]

Mr. Justice Harlan, acting as a Circuit Justice, has suggested that substantial issues are involved in this area. *Public Service Board of State of Vermont* v. *United States,* 87 S. Ct. 3, 4 (1966).

The present conflict among the district courts on jurisdiction to review is creating considerable confusion, and is an invitation to venue-shopping. Plaintiffs seeking review of a passenger train discontinuance will stay clear of the District of Minnesota and the District of New Hampshire. On the other hand, they may bring their actions in the District of Vermont, the Middle District of Pennsylvania, the Northern Dis-

---

[7] *City of Chicago* v. *United States,* No. 68 C 2184, Swygert, C.J., Hoffman and Marovitz, D.J.J. Undergoing review is *Illinois Central R. Co. Change in Service,* 333 I.C.C. 853 (1968). Final hearing on the merits has been set for May 23, 1969.

[8] Now on appeal in this Court. No. —, October Term, 1968, *State of New York* v. *United States.*

[9] *City of Sheridan* v. *United States,* No. 5316-Civil, Hickey, C.J., Chilson and Kerr, D.J.J. Undergoing review is *Chicago, B. & Q.R. Co.—Discontinuance of Trains,* 334 I.C.C. 210 (1969). Final hearing on the merits has been set for June 9, 1969.

trict of New York, and apparently also in the District of Wyoming. A hopeless split of authority exists in the Northern District of Illinois; jurisdiction to review in that court depends upon the judges to whom the case may be assigned.

Passenger train proceedings brought before the Commission involve multi-state train operations. These cases typically draw the intervention of numerous protestants, such as States, communities, civic groups and labor organizations. Under the special venue statute governing judicial review of Commission decisions, noted last term,[10] any of these parties may institute an action where it resides or has its principal office. 28 U.S.C. § 1398(a). The present split between the lower courts on the jurisdictional question, with the wide opportunity for a selection of forum, strongly suggests that the issue be resolved promptly.

ARGUMENT

The court below recognized the unfairness of allowing the railroads to seek review of Commission decisions adverse to them, but denying States and communities a similar right when they lose at the agency level. (App. B, p. 6a) The court below placed principal reliance upon *State of Minnesota, supra.* It concluded that an action will not lie to review a train discontinuance, even though the Commission had initially entered upon an investigation into the proposed discontinuance, served an order upon the carrier requiring continued operation pending hearing and decision in its investigation and, finally, four months later issued a detailed report based upon an evidentiary

[10] *Penn-Central Merger Cases,* 389 U.S. 486, 505, 544-45 (1968).

record finding that the trains should be discontinued. The court reasoned that since the order entered at the conclusion of the investigation is in the form of an order discontinuing the investigation, it is not an appealable "order" within the meaning of 28 U.S.C. § 1336. (App. B, p. 7a) On the other hand, if the railroad has been denied the right to terminate the trains, the railroad would have the right of redress in the courts since an "order" would be entered requiring continued operation. (App. B, pp. 6a-7a) Moreover, the court relied upon *State of Minnesota, supra,* to find no logical difference between the instant proceeding and situations where the Commission, in its discretion, had declined to institute any investigation whatsoever. Two such situations were *State of New Jersey* v. *United States,* 168 F. Supp. 324 (D. N.J. 1958), aff'd *per curiam* 359 U.S. 27 (1959) and *Sludden* v. *United States,* 211 F. Supp. 150 (M.D. Pa. 1962).[11]

Contrary to the opinion of the court below, judicial review of final agency action is available except to the extent that statutes preclude judicial review. 5 U.S.C. § 701. An "order" is defined in the Administrative Procedure Act as the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form. 5 U.S.C. § 551. In holding that an "order" is involved where a railroad seeks to set aside an agency decision requiring continued operation

[11] The opinion below incorrectly states, "It has been conceded by both sides that when the Commission decides not to enter into an investigation, there is no judicial review." (App. B, p. 4a). No such concession was made by plaintiffs below; rather, the railroads and the Government hold to this position. The point would seem irrelevant in any event, since here the Commission did enter upon an investigation, held hearings, and issued a 17-page printed report containing its findings and conclusions.

of a passenger train, but that an "order" is not involved where States and communities seek to set aside the final decision allowing discontinuance of the train service, the court below has resurrected the long-discarded "negative order" doctrine. Mr. Justice Frankfurter stated for the Court in *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 143:

> We conclude, therefore, that any distinction, as such, between "negative" and "affirmative" orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding.

It is now settled that Congress will not be presumed to cutoff judicial review of final agency action unless there is a persuasive reason to believe that such was the purpose of Congress. Recently the Court held in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140 (1967):

> . . . a survey of our cases shows that judicial review of final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.

It is patently unfair to allow judicial review for the railroads, but to deny access to the courts by States and communities. There is nothing in the legislative history of Transportation Act of 1958 to suggest such a result.[12] The Congress was indeed concerned with

---

[12] See: Hearings on S. Res. 284, *Passenger Train Discontinuances,* Surface Transportation Subcommittee of the Committee on Commerce, 89th Cong., 2d Sess. (1966). The general opinion of the members of the subcommittee was that section 13a(1) was not intended to prohibit court review.

alleged delays by State regulatory bodies in processing discontinuance applications, and Congress imposed a four-month limitation upon the Commission within which to decide a train-off case. But there is no showing of any complaint against the State judiciary in the transference from State regulation to federal regulation. There is thus no presumption that Congress intended to deny traditional judicial remedies for unlawful agency action. Judicial review is the technique by which administrative agencies keep within the guidelines set by Congress. Congressional impatience with State regulatory commissions, and a desire to assist the railroad industry, are insufficient grounds to infer an intent to deny judicial review for States and communities while granting judicial review for the railroads.

The reliance of the court below upon *State of New Jersey, supra,* is misplaced, since that case involved only whether the decision of the Commission not to enter upon an investigation, under the facts present in that case, is committed exclusively to agency discretion. There are many situations in administrative law where the failure of an agency to enter upon an investigation when requested to do so may not be reviewable, whereas the decisions and findings entered after investigation and hearing are subject to judicial review. This is the situation where the Commission fails to enter upon an investigation or to suspend reduced freight rates, a matter committed wholly to agency discretion. *Arrow Transp. Co.* v. *Southern R. Co.,* 372 U.S. 658 (1963). The same freight rates are subject to judicial review upon completion of the investigation or after a formal complaint is dismissed. The same rates involved in *Arrow, supra,* were later litigated in *Cincinnati New*

Orleans & Texas Pac. R. Co. v. *United States*, 229 F. Supp. 572 (S.D. Ohio 1964), modified sub nom. *Arrow Co.* v. *Cincinnati, N.O. & T.P.R.*, 379 U.S. 642 (1965).

The court below erred in assuming that the *per curiam* affirmance last term in *City of Williamsport, supra,* did not confirm the right to judicial review. The district court for the Middle District of Pennsylvania rejected the reasoning of *State of Minnesota, supra* and *State of New Hampshire, supra,* and held that jurisdiction to review does exist. 273 F. Supp. at 901-3. Later, on the merits, the district court upheld the Commission's findings allowing part of the train to be discontinued. 282 F. Supp. 46. Although the second *City of Williamsport* opinion did not again discuss the jurisdictional contentions, it did make reference to its prior opinion by way of a footnote. 282 F. Supp. at 47, fn. 2. In this Court, the jurisdictional statement presented in *City of Williamsport* set forth the conflict between district courts. The fact that appellees in *City of Williamsport* did not challenge jurisdiction would seem entitled to little weight. Jurisdiction is regulated by Congress, not by the parties. *American Fire & Cas. Co.* v. *Finn,* 341 U.S. 6, 17-18 (1951); *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 305-6 (1962).

The opinion of the court below has revived confusion, and has rendered uncertain that which seemed certain only a short while ago.

CONCLUSION

Probable jurisdiction should be noted and the judgment below reversed. Cf. *United States* v. *Dixie Express,* 389 U.S. 409 (1967).

Respectfully submitted,

Of Counsel:

MATHIAS M. MATTERN
BERNARD RANE
MARK GOLDSTEIN
511 City Hall Bldg.
Chicago, Ill.

KEITH E. ROBERTS
120 S. LaSalle St.
Chicago, Ill. 60603

ANTHONY HASWELL
333 N. Michigan Ave.
Chicago, Ill. 60601

WILLIAM E. NELSON
Dyer Building
Hoopeston, Ill. 60942

WENDELL W. WRIGHT
MARION E. WRIGHT
106 N. Vermilion St.
Danville, Ill. 61832

GEORGE B. TOFAUTE
17 Harding Ave.
Terre Haute, Ind. 47801

ROBERT P. DOOLITTLE, JR.
801 Busseron St.
Vincennes, Ind. 47591

HENRY C. NEEL
Farm Credit Bldg.
Henderson, Ky.

EUGENE W. WARD
J. KENNETH ATKINS
C-1, 120 Cordell Hull Bldg.
Nashville, Tenn. 37219

WILLIAM F. BLACK
CARL L. EVANS
State Office Bldg.
Montgomery, Ala. 36102

CARL E. VAN DORN
807 State Office Bldg.
Indianapolis, Ind. 46204

BENNETT E. SMITH
State Office Bldg., Rm. 1105
Jackson, Miss. 39201

CHESTER L. RIGSBY
State Office Bldg.
Frankfort, Ky. 40601

RAYMOND F. SIMON
511 City Hall Bldg.
Chicago, Ill. 60602

CHARLES E. GRIFFITH III
ROBERT E. KENDRICK
204 Metropolitan Courthouse Bldg.
Nashville, Tenn. 37201

ARTHUR K. BOLTON
J. ROBERT COLEMAN
132 State Judicial Bldg.
Atlanta, Ga. 30334

GORDON P. MACDOUGALL
705 Ring Bldg.
Washington, D. C. 20036

Attorneys for Appellants

May 1969